Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

Janet Pippins,

Petitioner

v.

Tangipahoa Parish Council and Gordon Burgess,

Respondent

On Petition of Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the proper analysis for purposes of determining summary judgment?

2. Did the district court and the Fifth Circuit improperly apply the summary judgment standard for employment discrimination cases?

PARTIES TO THE PROCEEDINGS

1. Janet Pippins, petitioner
2. Tangipahoa Parish Council, respondent
3. Gordon Burgess, respondent

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No. 04-30817
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STATEMENT OF JURISDICTION

The decision and opinion of the United States Court of Appeals for the Fifth Circuit was issued and filed on **January 26, 2005**. This Petition for Writ of Certiorari is filed within 90 days after the filing of that opinion and decision. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 United States Code § 1254(1) providing in pertinent part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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STATEMENT OF THE CASE

Janet Pippins was wrongfully terminated from her position as the director of the Tangipahoa Parish's Animal Control Department based on her gender on March 19, 2002. Gordon Burgess, Tangipahoa's Parish President, made the decision to terminate Ms. Pippins. In making such a decision, Mr. Burgess proffered four reasons. Through this litigation Ms. Pippins has proven that none of the proffered reasons are credible and the true motivation for her termination was unlawful gender discrimination. In particular, Mr. Burgess claimed that Ms. Pippins: 1) failed to keep department spending within budgetary restrictions; 2) had poor public relations; 3) had poor moral within her department; and 4) resisted a directive by Mr. Burgess to not intervene in animal abuse cases involving livestock. Ms. Pippins presented a substantial amount of evidence to dispute all four reasons, including, but not limited to the testimony of Mr. Burgess himself, yet the district court dismissed the case on summary judgment and the 5th Circuit upheld the district courts decision.

The explanations given by Mr. Burgess are pretexts, and for that reason his motives for terminating Ms. Pippins must have involved gender discrimination. It was established in the discovery phase of this litigation that Ms. Pippins had no control over the actual spending of her department. Thus, Mr. Burgess' first proffered reason was proven to be a pretext as he conceded to this fact in his deposition. Next, in regards to Mr. Burgess' claim of poor public relations, it was established that Ms. Pippins dealt with the local press upon the order of Mr. Burgess. In fact, it was Mr. Burgess who ordered her to continue speaking with a local reporter despite the fact that the reporter refused to report any complimentary stories regarding the department and focused only on stories that were less than flattering. Mr. Burgess also makes the

claim that Ms. Pippins' office had a moral problem. However, there was absolutely no evidence presented to substantiate this claim. Finally, Mr. Burgess claimed that Ms. Pippins resisted his directive regarding the handling of livestock cases. However, the evidence clearly indicated that this allegation was false as Mr. Burgess was unable to cite one incident in which Ms. Pippins had violated his directive. In fact, as the evidence established, on January 29, 2002, Tangipahoa Animal Control responded to a request from the Sheriff's Department to handle an issue on Galafora Road regarding starved horses. Prior to responding to the request Janet Pippins obtained permission from Preston K. "Buddy" Weir, Parish Finance Administrator. The procedure stipulated at the time was that Animal Control officers could investigate livestock cases accompanied by a Tangipahoa Parish Sheriff's deputy, but could not seize or impound animals without the approval of Mr. Burgess or Mr. Weir. Ms. Pippins followed this directive even though she had not yet been issued the directive. In a separate incident on March 12, 2002, Ms. Pippins rode with an Animal Control Officer to follow up on a complaint regarding mistreated and possibly dying horses. Upon arriving at the location she observed several horses in a very poor condition. Ms. Pippins followed Mr. Burgess' directive as she contacted the sheriff's office to send a deputy so that she could speak with the owners of the horses. Soon after, Ms. Pippins was contacted by Donna Damiano, Mr. Burgess' secretary, and told to immediately contact Mr. Burgess because he was very upset. Even though Ms. Pippins followed the directive given to her, Mr. Burgess screamed at her and ordered her back to the animal shelter. Ms. Pippins followed his directive and returned to the shelter, where she contacted the Brand Commission so that the horses would be cared for. Neither Ms. Pippins, nor the Tangipahoa Animal Shelter seized any horses involved in this incident. In fact, when Ms. Pippins was asked by the Brand Commission to shelter

the seized horses, she refused in light of Mr. Burgess' directive. As these were the only two incidents involving livestock within the preceeding months of Ms. Pippins' termination, Mr. Burgess was unable to articulate in any way how Ms. Pippins' actions in either case was a violation of his directive.

On January 19, 2003, Janet Pippins filed suit. Despite the fact that the record is absent of any evidence that substantiates that Janet Pippins violated any order, the district court granted summary judgment to the defendants on June 8, 2004. On January 26, 2005, the Court of Appeals for the Fifth Circuit incorrectly upheld that improper decision.

ARGUMENT

Summary judgment applies where there is "no genuine issue as to any material fact." *Machinchick v. PB Power*, 2005 U.S. App. LEXIS 1165, 4 (5TH Cir., 2005). When analyzing a case for summary judgment the facts should be considered in a light most favorable for the non-moving party. *Reeves v. Sanderson Plumbing Prods.*, Inc., 530 U.S. 133, 152 (2000). The Civil Rights Act of 1991 section 107(m) designated a "motivating factor" as the standard of review in employment discrimination cases. Historically, the Supreme Court has designed two frameworks for employment discrimination cases: *McDonald Douglas* and *Price Waterhouse*.

McDonald Douglas Corp. v. Green, 411 U.S. 792, 801, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), establishes three steps to prove that discrimination took place. The first step is to determine if the plaintiff can establish a *prima facie* case. If the plaintiff is capable of meeting this burden, it is then the

burden of the defendant to proffer a non-discriminatory reasons for the adverse action. If the defendant is capable of doing so, then the plaintiff must dispute the non-discriminatory reasons by questioning its validity and proving that the proffered explanation is a mere pretext to disguise unlawful discrimination.

The second discrimination analysis, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 238, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), left confusion over whether the standard should be "substantial" or "motivating" factor. However, the Civil Rights Act of 1991 requires proof that discrimination was a "motivating factor" in the employer's choice to make an adverse employment decision. Discrimination does not have to be **the** reason for the adverse action, but rather **a** reason. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-102,123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003) (emphasis added).

The problem with these two analyses, since the *Desert Palace* decision, is that the circuits are divided on how to analyze cases on summary judgment. Because circumstantial evidence can be useed in a *Price Waterhouse* mixed motive case, there are conflicting views on whether the *McDonald Douglas* analysis should still be utilized. Some circuits have not dealt with the issue, while others have created a clear plan.

I. How to Analyze Summary Judgment in Employment Discrimination Cases

The circuits that have dealt with the issue of how to analyses summary judgment cases in light of *Desert Palace* have created four different ways to view evidence. Each of these methods gives evidence a different weight, which

could be a determinative factor in whether a case survives summary judgment.

The first method was created by the Fourth Circuit, which utilizes the *McDonald Douglas* framework and the mixed motive, *Price Waterhouse*, framework as two separate ways to look at the facts. *Mereish v. Walker*, 359 F. 3d 330, 334 (4th Cir., 2004). *EEOC v. Warfield-Rohr Casket Company, Inc.*, 364 F.3d 160, 163 (4th Cir., 2004). Under this theory, a plaintiff can claim either framework at the summary judgment phase.

The Third, and Fifth Circuits follow the *McDonald Douglas* framework and give two options at the pretext stage. The plaintiff can: 1) prove pretext; or 2) that the case is a mixed motive case where discrimination was a motivating factor. *Parks v. Rumsfeld*, 2005 U.S. App. Lexis 150, 4-5 (3rd Cir., 2005). *Rachid v. Jack in the Box*, 375 F. 3d 305, 312 (5th Cir., 2004). This framing of the issues is similar to that of the Fourth Circuit, except a plaintiff has to establish a *prima facie* case. Even if the plaintiff has strong circumstantial evidence that would prove discrimination was a motivating factor, the case will end on summary judgment if the plaintiff cannot prove a prima facie case.

Next, the Seventh Circuit questions whether there is a motivating factor as part of the *McDonald Douglas prima facie* case, but the Seventh Circuit has not answered the question of what happens after a plaintiff establishes a prima facie case. *Hall v. Babb*, 389 F.3d 758, 762 (7th Cir., 2004).

Finally, the Eleventh Circuit uses the *McDonald Douglas* framework, but at the third stage instead of asking if there is pretext, the court asks if discrimination was a motivating factor. Proof of pretext can be used in making the determination if discrimination was a motivating factor for

the adverse action. *Hall v. Alabama Association of School Boards*, 326 F.3d 1157, 1167 (11th Cir., 2003).

The various circuits use different criteria in deciding if summary judgment is appropriate in employment discrimination cases. The different means of evaluating summary judgment create a question of whether reasons given by an employer that are proven to be pretext can be used in deciding motivating factor. The Eleventh Circuit is the only circuit that clearly states that proof of pretext helps substantiate that discrimination was a motivating factor. This Honorable Court should settle the matter concerning how to determine summary judgment and how evidence of pretext should be incorporated.

II. Whether the fifth circuit and the district court improperly applied the standard for summary judgment

Following *Desert Palace*, the Fifth Circuit created a new form for summary judgment in employment discrimination cases. In *Rachid v. Jack in the Box*, 375 F. 3d 305, 312 (5th Cir., 2004), the court combined the *McDonald Douglas* analysis and the mixed motive *Price Waterhouse* analysis. *Rachid* follows the *McDonald Douglas* framework by requiring that the plaintiff first prove a prima facie case. Then *Rachid* compels the defendant to provide non-discriminatory reasons for its action. However, at the third stage, *Rachid* gives the plaintiff a choice to analyze the case under pretext or to prove discrimination was a motivating factor. Both the district court and the Fifth Circuit analyzed Ms. Pippins case only from a pretext standpoint. They neglected to consider a mixed motive analysis. They also misconstrued key facts given in depositions as the overwhelming evidence which established pretext was not

viewed in a light most favorable to the non-moving party in a summary judgment stage.

Pretext:

It was without question that Ms. Pippins established a prima facie case as such was conceded by defendant at the summary judgment stage. The only issue before the court at that point was whether or not defendants' proffered explanation was a mere pretext for unlawful discrimination. The record evidence more than substantially carried that burden as each of Mr. Burgess' proffered explanations was proven to be pretextual by his own testimony. As such, this matter was improperly disposed of at the summary judgment stage as credibility determinations should have been left to a jury.

First, the district court and the appellate court could not have viewed all the circumstantial evidence in a light most favorable to Ms. Pippins and still neglect to find pretext. Thus, either the courts failed to consider the circumstantial evidence or they did not view the case in a light most favorable to Janet Pippins. The appellate court stated that the employer's reasons were "relatively so substantial that a reasonable jury" could not find for the plaintiff. Judgment of the Fifth Circuit court of Appeal, p. 3. Mr. Burgess gave four reasons that he claimed to rely on in his decision to terminate Ms. Pippins: 1) failed to keep department spending within budgetary restrictions; 2) resisted a directive by Mr. Burgess to not intervene in animal abuse cases involving livestock; 3) had poor moral within her department; and 4) had poor public relations. Ms. Pippins provided very influential information discrediting all of these reasons and yet the district court still improperly determined that she had not proven pretext. This determination was made even in

light of the testimony from the decision maker that established that his proffered explanation was false.

Mr. Burgess claimed that Ms. Pippins failed to keep to the budget. However in its decision the district court stated that the, "record reveals some inconsistencies in Burgess' explanation regarding the complaint regarding the budget." District Court's Order and Reasons p. 18. The district court considered that this rational could be a pretext, and therefore this provided reason would not be sufficient to grant summary judgment. It is the jury's job to weigh the facts. Yet, the Fifth Circuit did not take into account the district courts finding that there was enough evidence to question whether the overdrawing on the budget was a pretext. In making this decision the Fifth Circuit went against the district courts findings without explaining why it overturned the fact-finding by the district court.

The district court also considers Mr. Burgess' explanation that he terminated Ms. Pippins because she failed to follow his directive regarding livestock. In this matter the district court misconstrued the plaintiff's statement regarding the policy on livestock. Ms. Pippins was only involved in two significant incidents involving livestock. The first was not an issue, because she followed a procedure created by Mr. Burgess, even though she had not yet received her directive regarding the procedure. The incident at issue is March 12, 2002. The district court states that it was the policy at that time to leave intervention in livestock cases to the Parish Sheriff and the Brand Commission. This was not the case. PEx #3, p. 21 In her deposition Ms. Pippins stated that Mr. Burgess' plan was for Ms. Pippins to contact a Tangipahoa Sheriff's deputy to observe the animal with her and then to get permission from Mr. Wier or Mr. Burgess before seizing the animal. R. 357-358, 403. Ms. Pippins followed this procedure and this was

the only procedure she knew of at the time. It was only after this incident that Ms. Pippins was informed that she should contact the Brand Commission so that they could care for livestock instead of the Animal Control Department. It is because the district court misconstrued the timeline of events that it mistakenly did not find pretext.

This evidence is only reinforced by the fact that Mr. Burgess could not think of any instance where Ms. Pippins failed to follow his directive. The appellee's brief states that Ms. Pippins "resisted the implementation of this policy," but it does not explain how she "resisted the implementation." Brief for Appellee, p. 6. Ms. Pippins has clearly stated that while she did not like the policy, she was willing and did follow the directive given to her by Mr. Burgess. R. 301. In his deposition, Mr. Burgess was unable to provide any instance where Ms. Pippins refused to follow his directives. R. 359. How can there not be "sufficient evidence" if the person who made the decision admits in his deposition that his reasoning is a pretext? The truth is that Ms. Pippins did follow the orders given to her and complied by turned away an abused horse when she was asked to care for it. R. 301. Ms. Pippins at no time disregarded Mr. Burgess' order. Thus, his non-discriminatory reason is not only weak, but there is sufficient circumstantial evidence to prove Mr. Burgess' reason is a pretext.

Mr. Burgess also gave additional reasons for his termination of Ms. Pippins. However, neither the district court, nor the Fifth Circuit considered by name the other non-discriminatory reasons in their final explanation of their decision. Thus, it can be assumed that the other reasons given were not strong enough to justify the termination or there was not sufficient proof to justify summary judgment. The defense did not prove that the media problem or the poor office morale were actually caused by Ms. Pippins. If Mr.

Burgess fired Ms. Pippins based on these reasons, he should provide evidence that led him to believe that Ms. Pippins caused these problems. Yet, the defendant has not provided evidence that these two issues were caused by Ms. Pippins, which is part of its burden of production under *Reeves*. Therefore, the only reasons given by Mr. Burgess that are under consideration are his complaints concerning the budget and livestock. Ms. Pippins has proven through circumstantial and direct evidence that both of these reasons are pretexts.

However, even if it is found that the appellate court did consider circumstantial evidence in its determination on summary judgment, then it is apparent that the Fifth Circuit did not view the evidence in a light most favorable to Janet Pippins. If the court had viewed the evidence in a light most favorable to Ms. Pippin's then it would have found sufficient disputed evidence for a trial. Because of the dispute over the evidence and the convincing proof of pretext, this case should be decided by a jury. Thus, summary judgment was not appropriate.

Motivating Factor:

Rachid also addressed the change in proof needed to overcome summary judgment. The Civil Rights Act of 1991 only requires the plaintiff to prove that gender discrimination was a motivating factor. Neither the district court, nor the Fifth Circuit addressed whether gender discrimination was a motivating factor in this case. In addressing this question it is clear that plaintiff's *prima facie* case should be considered. However, the Fifth Circuit is unclear on whether proof of pretext can be applied when determining if discrimination was a motivating factor. The Eleventh Circuit clearly espouses the idea that it should be contemplated and is an

important element. Because there is not uniform understanding, the issue of pretext should be considered.

Ms. Pippins proved a *prima facie* case by presenting evidence that her position was filled by a man, who was in her opinion less qualified. But, she also presented evidence proving pretext. Ms. Pippins clearly caused the district court to question three of Mr. Burgess non-discriminatory reasons and these reasons should be considered in deciding if gender discrimination was a motivating factor. The fact that Mr. Burgess gave four reasons for firing Ms. Pippins and three of the reasons were not only very questionable, but to some extent ridiculous should be a factor that the court considers. Thus, the manner of Ms. Pippins' termination mixed with the pretextual reasons given by Mr. Burgess create a question as to Mr. Burgess' motives. Because Mr. Burgess' motives can be questioned, Ms. Pippins proved that gender discrimination was a motivating factor and this case should be decided by a jury.

CONCLUSION

It is clear that the Fifth Circuit not only declined to follow case law when making its pretext determination, but also mistakenly forgot to analysis whether gender discrimination was a "motivating factor". The Fifth Circuit either did not consider the circumstantial evidence of pretext given by Ms. Pippins or it did not view the evidence in a light most favorable to Ms. Pippins. Ms. Pippin proved that Mr. Burgess' reasons for terminating her were pretexts. The Fifth Circuit also neglected to determine if discrimination was a "motivating factor." In failing to make this determination, the Fifth Circuit granted summary judgment to the defendant in a case that should have gone to the jury.

It is also apparent that conflicting law between the jurisdictions could change the effect of the evidence provided on this case. The way the case is analyzed could have an effect on the outcome. Therefore, the United States Supreme Court should grant this writ to clarify the law and give Ms. Pippins her day in court.

Respectfully Submitted by:

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